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NO. 82-1398

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

**M/V POLLUX, HER ENGINES, TACKLE,
APPAREL, ETC., IN REM AND
NEGOCIOS DEL MAR, S.A.,**
Petitioners

v.

GOODPASTURE, INC.,
Respondent

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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v.

GOODPASTURE, INC.,
Respondent

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

STATEMENT OF THE CASE

The Petitioner's statement of the case contains numerous assertions not supported by any finding of fact made by the District Court. Rather than correcting these errors one by one, Respondent submits the following statement drawn from the District Court's Findings of Fact and Conclusions of Law, and from the opinions of the Fifth Circuit Court of Appeals.

In February of 1979, Respondent Goodpasture agreed to sell 20,000 metric tons of wheat (10% more or less at

buyer's option) to Empac Grain Company. Under the terms of the sale Respondent was to load the grain into a vessel to be named by Empac. Empac agreed that Respondent would retain ownership of the grain until the purchase price was paid.

In March, 1979, Empac chartered the Petitioner's M/V POLLUX to carry the grain from Houston to South America. Respondent was not in any way privy to the dealings between Empac and Petitioner. On April 11 and 12, 1979, the POLLUX was loaded at Respondent's Houston facility. On the evening of April 12, Petitioner's Chief Executive Officer, Abel Woll, told Respondent that Petitioner was asserting a possessory lien against Respondent's grain, holding the grain as security for debts allegedly owed by Empac.

The following day, April 13, 1979, Respondent commenced this action against the M/V POLLUX, *in rem* and Negocios del Mar, *in personam*, for conversion and for wrongful refusal to issue a bill of lading. Petitioner filed a Third Party Complaint against the cargo of wheat, *in rem*, alleging that it had a possessory lien against the wheat to secure Empac Grain Company's indebtedness.

Petitioner also moved to dismiss Goodpasture's suit, and to lift the arrest of the POLLUX alleging that Goodpasture was not the owner of the grain. Petitioner requested and was granted a hearing on its motion to dismiss. The hearing was held on May 30, 1979. At that hearing, both Petitioner and Respondent agreed that Petitioner's claims against the wheat were not in issue, but only Goodpasture's ownership of the grain. The Court then, at Petitioner's urging, set the case for trial to deter-

mine the ownership of the grain and Respondent's right to maintain the arrest of the POLLUX.

The trial was held on June 19, 1979. Prior to the trial the District Court informed the parties that the facts found that day would be *res judicata* throughout the remaining course of litigation. At issue was the question of ownership of the grain. Petitioner contended that title to the grain passed from Respondent to Empac when the grain was loaded in the POLLUX, that Respondent did not own the grain and was not entitled to sue for conversion of the grain. Respondent countered with evidence establishing that its ownership was to continue until Empac paid for the grain. Since Empac never paid, the grain remained Respondent's property.

On June 20, the District Court filed findings of fact and conclusions of law establishing that Respondent did indeed own the grain in the POLLUX. The Court concluded, nevertheless, that Respondent had no cause of action against Petitioner or its vessel and ordered the POLLUX released. On June 22, the District Court entered a Final Judgment in favor of Petitioner.

Respondent obtained a Stay of the District Court order releasing the POLLUX and appealed the Final Judgment to the Fifth Circuit Court of Appeals. In September of 1979, after briefing and oral argument, the Fifth Circuit reversed the District Court's judgment. The Fifth Circuit held that Respondent owned the grain in the POLLUX and that Petitioner converted Respondent's grain. *Petitioner never sought a writ of certiorari from that decision.*

On remand, Petitioner attempted to persuade the District Court to re-try the issue of ownership of the grain.

The District Court refused, holding that the issue had been resolved in the prior trial and appeal. To avoid another remand after appeal, however, the Court allowed Petitioner to introduce all the evidence it had concerning ownership of the grain. The District Court then weighed Petitioner's evidence under what the Judge himself characterized as "the most liberal of standards." (District Court's Memorandum and Order of June 11, 1980 at p. 13, reproduced at p. 49a and 50a of the Petition for Writ of Certiorari). Despite the fact that Petitioner was given the benefit of every doubt, the District Court again concluded that Respondent owned the grain and Petitioner converted it.

On appeal, the Fifth Circuit refused to reexamine the ownership-of-the-grain issue, holding that its 1979 decision constituted the law of the case. Judgment in Respondent's favor was affirmed.

Petitioner now asks this Court to review the case contending:

1. That the Petitioner was denied due process under the Fifth Amendment because it did not realize that the District Court was resolving the issue of ownership of the grain on June 18, 1979;
2. That the District Court's June 22, 1979 Final Judgment was not really a *final* judgment, so that the "law of the case" doctrine should not be applied to the ensuing appeal;
3. The Fifth Circuit's 1979 decision was wrong as a matter of law.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

Petitioner's Reasons 1 and 3 cannot provide a basis for granting a writ of certiorari because the Petition for Writ on those grounds is not timely. A Petition for Writ of Certiorari to hear Petitioner's complaints concerning alleged denial of due process in the June 18, 1979 District Court proceedings should have been filed no later than ninety days after the Fifth Circuit's 1979 decision. The same is true of Petitioner's grievance arising out of alleged mistakes of law in the Fifth Circuit's 1979 decision.

Moreover, Petitioner's present argument (that it did not know what issues were being tried on June 19, 1979) is completely contradicted by its written representations made to the Fifth Circuit Court of Appeals, wherein Petitioner admits that it knew the June 18 proceedings were a trial on the merits. Petitioner's admission in this regard also defeats its Reason 2 for granting Writ of Certiorari for, since all the parties and the Court have agreed that the June 18, 1979 proceeding was a trial, and since it resulted in a final judgment, the Appellate Court's decision on appeal from that judgment constitutes the law of the case.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI WAS NOT TIMELY FILED.

Petitioner cites three grounds for granting certiorari. The first relates to alleged constitutional defects in the June 18, 1979 trial. Petitioner contends that it was denied

due process because it did not know that the June 18 proceeding was a trial on the merits. The third relates to an alleged mistake of law in the ensuing 1979 appeal to the Fifth Circuit. Petitioner's request for certiorari on these points is untimely.

The Fifth Circuit's decision in the 1979 appeal was issued in September of 1979. Petitioner's Motion for Re-hearing was denied, and the Court of Appeals' mandate was issued on October 26, 1979.

28 U.S.C. § 2101 provides that, in a civil action, writ of certiorari shall be applied for within ninety days after entry of the judgment to be reviewed. Thus, this petition for certiorari filed in February of 1983 cannot subject the Fifth Circuit's 1979 opinion, or the issues resolved therein, to review.

II. PETITIONER WAS NOT DENIED DUE PROCESS IN THE JUNE 18, 1979 PROCEEDINGS.

A. Petitioner put ownership of the grain in issue.

The Petitioner itself defined the issues to be resolved in the June 18, 1979 proceedings. It framed those issues in the following language, contained in Petitioner's Motion to Lift Arrest at page 2:

"The contract reveals that title to the cargo of wheat passed from Plaintiff (Goodpasture) to Empac Grain Company 'expout' or at the time the cargo left the spout of the grain elevator. Empac became the owner of the goods at the time the cargo was loaded onto the M/V POLLUX. Consequently, Plaintiff has no right to maintain an action for conversation (sic)

against Defendants because only the owner of goods may maintain an action for their conversion."

The Motion is attached as Appendix A.

The District Court held a hearing on Petitioner's Motion to Lift Arrest on May 30, 1979. After hearing the arguments of counsel, the Court felt that there were fact issues to be resolved before it could decide who owned the grain. Petitioner then urged the District Court to schedule a trial of that issue as soon as possible. The District Court, over Respondent's objection, obliged the Petitioner and scheduled the trial for June 18, 1979.

B. Petitioner has judicially admitted that it knew the June 18 proceeding was a trial on the liability issues, and has further admitted that the June 18 trial was scheduled at its request.

Petitioner's brief to the Court of Appeals in this case contains, at page 3, the following statement concerning the June 18, 1979 proceedings:

"The shipowner (Petitioner) moved for and was granted a trial on the merits of Goodpasture's in rem cause of action against the vessel. After considering deposition testimony, testimony presented at trial, and the argument of counsel, the District Court granted a final judgment . . ." (Emphasis supplied).

The pertinent portions of Petitioner's brief are attached as Appendix B.

Contrary to the representations contained in its Petition for Writ of Certiorari, Petitioner had notice of the nature

of the June 18 proceedings, because the *trial* was held at Petitioner's own request. Does Petitioner seriously contend, at this late date, that it was denied due process because the District Court granted it the trial it admittedly requested?

C. The District Court intended that the June 18, 1979 proceeding be a trial.

The entries on the District Court's docket sheet substantiate that the June 18 proceeding was a trial. The docket sheet contains the following entries:

6-18-79 (RO) CASE CALLED FOR TRIAL ON PLAINTIFF'S IN REM CLAIM AGAINST THE M/V POLLUX.

6-19-79 (RO) CASE IN TRIAL 2ND DAY BEFORE THE COURT.

D. Petitioner briefed the issue of ownership to the grain in the 1979 appeal.

It is interesting to note that Petitioner briefed and argued the question of ownership of the grain in the 1979 appeal. Until it lost that appeal, it never once complained that it had insufficient notice that ownership was in issue in the June 18 trial.

III. THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY APPLIED THE LAW OF THE CASE DOCTRINE TO ALL PROCEEDINGS AFTER THE COURT OF APPEALS' SEPTEMBER 1979 DECISION.

Petitioner candidly admits that application of the law of the case doctrine was proper if the District Court's

June 28, 1979 Final Judgment is indeed a final judgment. *United States of America v. United States Smelting, Refining, and Mining Company*, 339 U.S. 186, 70 S.Ct. 537, 94 L.Ed. 750 (1950).

Respondent has quoted passages from Petitioner's brief in the Court of Appeals which clearly establish Petitioner's knowledge that the June 18 proceeding was a trial, held at Petitioner's request, and that the resulting judgment was a final judgment. The 1979 appeal was from that final judgment. Yet Petitioner now argues that the trial was not really a trial and that the appeal was merely interlocutory. Nothing in the record lends any support to that argument.

The United States Courts of Appeals hear appeals only from final decisions, with a few limited exceptions. *Cobbledick v. U.S.*, 309 U.S. 323, 760 S.Ct. 540, 84 L.Ed. 7831 (1940); *Andrews v. U.S.*, 373 U.S. 334, 83 S.Ct. 1236, 10 L.Ed.2d 383 (1963). This policy is incorporated in 28 U.S.C. § 1291 which grants the Courts of Appeals "jurisdiction of all appeals from all final decisions of the district courts . . ." Interlocutory appeals lie only under the "collateral orders" doctrine, not applicable here, or under 28 U.S.C. § 1292. 1292(a), by its own terms, is inapplicable to this controversy. § 1292(b) authorizes an interlocutory appeal only when the district court certifies that an interlocutory order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. If the trial judge makes the necessary certificate the Court of Appeals may, in its discretion, hear the case.

However, no such certificate was made here. The district court entered a final judgment. The Court of Appeals received and docketed the appeal as one from a final judgment. The Court of Appeals rendered its decision, and no petition for writ of certiorari was filed within the time allowed by law. The opinion of the Court of Appeals was therefore properly treated as the law of the case.

CONCLUSION

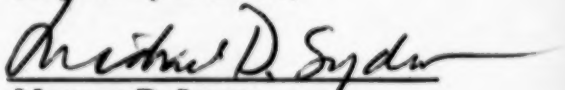
Petitioner cannot obtain review of alleged defects in the Court of Appeals' 1979 decision because it did not petition for writ of certiorari within ninety days from the date mandate was issued in that appeal. Petitioner cannot obtain review of alleged due process violations in the June 1979 district court proceedings because it did not timely appeal those alleged violations to the Court of Appeals. Having failed to present them to the Court of Appeals, Petitioner may not raise them for the first time in this Court.

Petitioner's contention that it did not realize that the issue of ownership of the grain was being tried on June 18, 1979, is contradicted by Petitioner's own written representations to the Court of Appeals.

Petitioner's contention that the 1979 appeal was merely interlocutory is completely rebutted by the record in this case.

For the foregoing reasons, Respondent Goodpasture, Inc. respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Michael D. Sydow", is written over a horizontal line.

MICHAEL D. SYDOW
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*Attorney for Respondent
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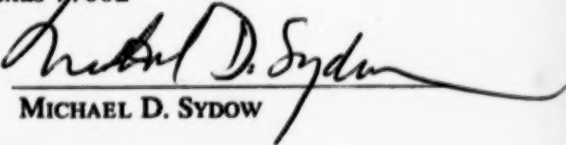
Of Counsel:

EASTHAM, WATSON, DALE & FORNEY

PROOF OF SERVICE

I, Michael D. Sydow, a member of the Bar of this Court, do hereby certify that three true and correct copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari have been served on each party separately represented in this proceeding by depositing the same in a United States post office with first-class postage prepaid, certified, return receipt requested, on this 17 day of March, 1983, addressed as follows:

E. D. Vickery
Kenneth D. Kuykendall
Royston, Rayzor, Vickery & Williams
2200 Texas Commerce Tower
Houston, Texas 77002


MICHAEL D. SYDOW

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APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

C. A. NO. H-79-770

**GOODPASTURE, INC.,
Plaintiff**

v.

**M/V POLLUX, Her Engines, Her Tackle, Her Apparel,
Etc., *in rem*, NEGOCIOS DE MAR S.A., and
EMPAC GRAIN CO., Her Owners, Operators,
Managers and/or Charterers, *in personam*,
Defendants**

**DEFENDANT NEGOCIOS DE MAR, S.A.'S
MOTION TO LIFT ARREST OF M/V POLLUX**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant and Claimant of the M/V POLLUX, Negocios De Mar, S.A., pursuant to the Federal Rules of Civil Procedure, and moves this Honorable Court to lift the arrest of the M/V POLLUX, and in support thereof would respectfully show as follows:

I.

Plaintiff, Goodpasture, Inc., arrested the M/V POLLUX pursuant to its Original Complaint on April 13, 1979. Plaintiff alleges that the M/V POLLUX was liable *in rem* because Plaintiff delivered aboard the vessel a cargo of wheat and Defendant Claimant refused to issue

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a bill of lading in the form demanded by Plaintiff i.e. "Freight Prepaid". Plaintiff also alleges Defendant-Claimant converted the cargo of wheat subsequent to its delivery onboard the M/V POLLUX. Subsequently, on April 25, 1979, Plaintiff filed its First Amended Complaint and added Empac Grain Co. as a Defendant, but Plaintiff did not change its allegations against Defendant-Claimant.

II.

Plaintiff Goodpasture, Inc. by and through its subsidiary, Goodpasture Export Corporation, entered into a contract with Empac Grain Company for the sale of wheat. A copy of the Confirmation of Sale contract is attached hereto and marked "Exhibit A". The contract reveals that title to the cargo of wheat passed from Plaintiff to Empac Grain Company "exspout" or at the time the cargo left the spout of the grain elevator. Empac became the owner of the goods at the time the cargo was loaded onto the M/V POLLUX. Consequently, Plaintiff has no right to maintain an action for conversation against Defendants because only the owner of goods may maintain an action for their conversion.

III.

Defendant-Claimant entered into a Charter Party with Empac Grain Company for carriage of certain grain cargo from Houston to Buenasventura. A copy of the New York Time Charter Party dated March 20, 1979, at Riverside, Connecticut is attached hereto as "Exhibit B". The terms of the Charter Party specify that Empac Grain Company should pay charter hire at the rate of \$7,550.00 per day for 24 days in advance and then pay

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such charter hire due on a day to day basis. (Clause 4 and 5) The Charter Party also requires Empac Grain Company to pay for bunkers in advance of the voyage. (Clause 48).

IV.

Grain Cargo was loaded onboard the M/V POLLUX on April 11, and 13, 1979. After the cargo had been loaded on April 12, 1979, the Master of the M/V POLLUX was presented a Bill of Lading containing the clause "Freight Prepaid". The Master refused to execute the Bill of Lading which incorporated the "Freight Prepaid" clause because charter hire had not been paid in accordance with the Charter Party. A copy of the Bill of Lading is attached hereto as "Exhibit C", and the Bill of Lading contains the clause "all terms, conditions and exceptions as per charter party." The Bill of Lading establishes that Empac Grain Company was the shipper of the cargo. Accordingly, Plaintiff has no right to demand the issuance of a Bill of Lading, and Defendant-Claimant had no obligation to issue a Bill of Lading to Plaintiff. Defendant-Claimant would further show that it agreed to provide a Bill of Lading to the shipper (Empac) covering the cargo of wheat bill but it would not execute a "Freight Prepaid" bill until the freight had been paid.

V.

Defendant-Claimant would respectfully show that the attached documentation establishes that Plaintiff Goodpasture, Inc. is not the owner of the cargo onboard the vessel, and it is not entitled to maintain a cause of action for conversation. Cargo was sold by Goodpasture to Empac and the risk of loss passed at the time the cargo

left the spout of the Goodpasture elevator. *Consolidated Bottling Co. v. Jaco Equipment Corp.*, 442 F.2d 660, 662-63 (2d Cir. 1971); *Larry Lightner, Inc. v. United States*, 213 F.2d 449, 451 (5th Cir. 1954); *A. C. Rent-A-Car, Inc. v. American National Bank & Trust Co.*, 339 F.Supp. 506, 512 (S.D. Ala. 1972), *aff'd per curiam*, 477 F.2d 564 (5th Cir. 1973); *Minex v. International Trading Co.*, 303 F.Supp. 205, 208 (E.D. Va. 1969); *Jackson v. Baldwin-Lima-Hamilton Corp.*, 252 F.Supp. 529, 536 (E.D. Pa.), *cert. denied*, 385 U.S. 803 (1966); *Ehrenberg v. Guerrero*, 225 S.W. 86, 88 (Tex. Civ. App.—El Paso 1920, no writ). Empac was the shipper and charterer of the vessel, and it was entitled to the issuance of the "Freight Prepaid" Bill of Lading as soon as it had paid charter hire and for bunkers in accordance with clauses 4, 5 and 48 of the Charter Party. Goodpasture, Inc. was not the owner or shipper of the cargo, and it does not have any standing to sue for conversion of the cargo or for failure of the vessel owner to issue a Bill of Lading. See *Bankers Life Insurance Co. v. Scurlock Oil Co.*, 447 F.2d 997, 1004 (5th Cir. 1971); *Guinn v. Lokey*, 249 S.W.2d 185, 186 (Tex. 1952).

VI.

Plaintiff Goodpasture, Inc. also alleges that it is entitled to seize the M/V POLLUX because Defendant-Claimant refused to issue a bill of lading for the cargo of wheat with the notation "Freight Prepaid" even though freight (charter hire) had not been paid. Nevertheless, the issuance of a bill of lading marked "freight prepaid" would extinguish Defendant's lien on the cargo for charter hire as to a third party holder of the bill of lading who acquired the bill without notice of such lien for charter hire.

Beverly Hills National Bank & Trust Co. v. Compania de Navegacione Almirante S.A., Panama, 437 F.2d 301 (9th Cir.), *cert. denied*, 402 U.S. 996 (1971). In addition, the issuance of the "Freight Prepaid" bill of lading without payment of freight would be a violation of the United States law, and such act could form the basis of a cause of action against Defendant-Claimant for fraud 49 U.S.C. § 121. See *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.*, 155 F. Supp. 886 (D.C.N.Y. 1957) *aff'd* 265 F.2d 418 (2nd Cir. 1959). Also the United States Courts would refuse to determine the rights of the respective parties who had entered into the agreement in violation of 49 U.S.C. § 121. See: *In the Matter of the Arbitration between Metal Transport Corporation and Compania Natural Naviera*, 268 F.Supp. 456 (S.D. N.Y. 1965).

WHEREFORE, PREMISES CONSIDERED, Defendant *Negocios De Mar, S.A.* respectfully moves that the arrest of the M/V POLLUX be lifted and that Defendants have such other and further relief to which they may be justly entitled.

Respectfully submitted,

/s/ KENNETH D. KUYKENDALL
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Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

CERTIFICATE OF SERVICE

I certify that on this the 21st day of May, 1979, a copy of the foregoing Motion was Hand Delivered to the attorneys for Plaintiff, Eastham, Watson, Dale & Forney, 947 Mellie Esperson Building, 804 Travis Street, Houston, Texas 77002 and Clann & Pearson, First City National Bank Building, Houston, Texas 77002.

**/s/ KENNETH D. KUYKENDALL
Of Royston, Rayzor, Vickery
& Williams**

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APPENDIX B

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NO. 79-2507

**GOODPASTURE, INC.,
Appellant/Cross-Appellee**

v.

**M/V POLLUX, Appellee/Cross-Appellant
EMPAC GRAIN CO., Appellee and
NEGOCIOS DEL MAR, S.A., Appellee/Cross Appellant**

NEGOCIOS DEL MAR, S.A., Appellee

v.

**A SHIPMENT OF WHEAT OF 19,067.949 METRIC
TONS PRESENTLY ONBOARD THE M/V POLLUX,
and
EMPAC GRAIN CO. and GOODPASTURE, INC.
Appellees**

**BRIEF OF APPELLEES/CROSS-APPELLANTS,
NEGOCIOS DEL MAR, S.A. AND
THE M/V POLLUX**

*** * ***

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STATEMENT OF THE CASE
COURSE OF PROCEEDINGS BELOW

* * *

The Shipowner moved for and was granted a trial on the merits of Goodpasture's *in rem* cause of action against the Vessel. After considering deposition testimony, testimony presented at trial, and the argument of counsel, the District Court granted a final judgment dismissing Goodpasture's Second Amended Original Complaint as to the Vessel, lifting the seizure of the Vessel and releasing the Vessel from arrest. (Record Excerpts 2 and 3) The District Court correctly concluded that Goodpasture had no *in rem* right against the Vessel, and that the seizure of the Vessel was illegal. However, upon Goodpasture's Motion, the Court entered an Order Granting Stay of the release of the Vessel pending Goodpasture's prosecution of an expedited appeal. (Record Excerpts 4)

* * *